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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 478

LOUIS SACHS AND RALPH SACHS, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Statutory Provision Involved	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	7
1. The Requested Accomplice Instruction	7
2. Harmless Error	9
3. The "Fictitious Name" Count	12
Conclusion	14
Appendix	1a

TABLE OF AUTHORITIES

CASES:

Caminetti v. *United States*, 242 U.S. 470 (1917) 9
Chapman v. *California*, 386 U.S. 18 (1967) 3, 10, 11
Dillon v. *Hunt*, 105 Mo. 154, 16 S.W. 516 (1891) 4
Harrington v. *California*, 37 U.S.L.W. 4472 (6-2-69) .. 12
Holmgren v. *United States*, 217 U.S. 509 (1910) 9
Katteakos v. *United States*, 328 U.S. 750 (1946) 3, 11
Lett v. *United States*, 15 F. 2d 686 (8 Cir. 1926) 8
McLendon v. *United States*, 19 F. 2d 465 (8 Cir. 1927). 8
Phelps v. *United States*, 252 F. 2d 49 (5 Cir. 1958) ..2, 7-8
Smith v. *Carrington*, 8 U.S. (4 Cranch) 62, 71 (1808).. 14
Stassi v. *United States*, 50 F. 2d 526 (8 Cir. 1931) ... 10
Strode v. *Meyer Bros. Drug Co.*, 101 Mo. App. 627, 74 S.W. 379 (1903) 4
Wells v. *Thomas W. Garland, Inc.*, 39 S.W. 2d 409 (Mo. App. 1931) 4
Williamson v. *United States*, 332 F. 2d 123 (5 Cir. 1964) 8

STATUTES:

18 U.S.C. § 1341 1
§ 1342 .....1, 2, 3, 12
28 U.S.C. § 1254 2

MISCELLANEOUS:

F.R. Crim. P. 52(b) 8
20 Cong. Rec. 13
Orfield, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 11

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Louis Sachs and Ralph Sachs, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, affirming convictions in the United States District Court for the Eastern District of Missouri, Eastern Division, on six counts of using the mails in a scheme to defraud (18 U.S.C. § 1341) and one count of using a fictitious name in furtherance of the scheme (18 U.S.C. § 1342).

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit, not yet officially reported, is printed in Appendix A to this petition (1a-22a).

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1969. No petition for rehearing was filed. By order dated July 7, 1969, Mr. Justice Byron R. White extended the time for filing this petition to and including August 16, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1342:

> Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

QUESTIONS PRESENTED

1. Whether, when the only proof of participation in the crime is uncorroborated accomplice testimony, it is reversible error to refuse to instruct that, if the jury finds an accomplice relationship, it should receive such testimony with caution. There is a conflict in the circuits. Compare *Phelps* v. *United States*, 252 F.2d 49, 52 (5 Cir. 1958) with the Eighth Circuit's holding in the instant case (18a-19a).

2. Is the harmless error test of *Chapman* v. *California*, 386 U.S. 18, 23 (1967) and *Kotteakos* v. *United States*, 328 U.S. 750, 762-765 (1946) undermined by the technique of appellate review that examines the evidence only in the light most favorable to the Government?

3. In commercial correspondence, under what circumstances does a signature which does not deceive the recipient or materially conceal the identity of the sender, constitute a "fictitious name" under 18 U.S.C. § 1342?

STATEMENT OF THE CASE

The Sachs brothers owned and ran a complex of small loan companies. They were convicted and received ten-year sentences [1] for alleged mail frauds involving six of the 21,000 loans issued by their companies (.05% of their total loan volume for that period) (Tr. 535-536), and for the alleged use of fictitious names in correspondence pertaining to one of the transactions.

This petition presents legal issues that all arise from the central question at trial: Were the Sachs brothers, at the head of the companies, implicated in the alleged frauds involving this proportion of the business?

The charges arose from the following situation: Five of the six borrowers had purchased life insurance to pay the debt in the event of death. When the borrower died, the loan company, although collecting the proceeds of the policies, either failed to refund any

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[1] Concurrent five-year terms on Counts I, III, V, and VIII, followed by concurrent five-year terms on Counts II, IV, and VI. (Tr. 867-869.)

excess to the widow, or continued to collect on the loan. The Sachs brothers denied any knowledge of these double collections. The six loan differed from the other five in that company itself purchased the credit life insurance, after the borrower refused to do so. The Sachs brothers admitted they knew of the double collection on this loan, claiming their attorney had advised them that, because of the special circumstances, the payment under this insurance policy did not extinguish the obligation of the borrower or his co-obligors.[2] (Tr. 627, 629-30, 680-85, 687, 693, 697, 701-02, 724-25, 751-52, 755-57.)

For purposes of this petition, it is vital to note that the Government's only evidence that the Sachs brothers devised or even knew about the alleged scheme came from two witnesses, Clara Wells and Howard Hunt.

Clara Wells was in charge of the loan companies' insurance department. (Tr. 144-49, 157-61, 182-84, 222-34, 238, 424-25, 568-71, 579-80, 593-95, 620-22, 721.)

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[2] This advice was correct. Under Missouri insurance law, the Sachs brothers were entitled to insure their borrower's life in the amount of the debt outstanding at death. *Strode* v. *Meyer Bros. Drug Co.*, 101 Mo.App. 627, 74 S.W. 379 (1903). Under the collateral source rule, applicable in Missouri to contracts as well as torts, the payment to the Sachs brothers under this insurance policy did not extinguish the borrowers' liability on the debt, since none of them could claim the benefit of an insurance policy to which they were admittedly strangers. *Wells* v. *Thomas W. Garland, Inc.*, 39 S.W.2d 409, 412 (Mo.App. 1931). Missouri has uniformly applied the collateral source rule to deny a stranger the benefit of *any* insurance contract in an unbroken line of cases from the 19th century. See *Dillon* v. *Hunt*, 105 Mo. 154, 16 S.W. 516 (1891). The Eighth Circuit nonetheless refused to apply the collateral source rule to this transaction and therefore held the double collection illegal. It also ignored the contention that, even assuming Missouri would depart from this line of cases, the cases negative any inference that the Sachs brothers *intended* to defraud.

While these double collections were still going on (Tr. 261, 298-303, 463, 468, 481-83, 620), she and the bookkeeper, Paul Rouillard, devised a plan to feather their nests at the companies' expense. (See also Tr. 117, 150-54, 164-65.) They contacted the borrowers involved in the alleged frauds, offering to engineer lawsuits against the loan companies, with Rouillard and Wells to supply the cause of action, the evidence, the costs of litigation, and the attorney. In return, they demanded silence concerning their management of the litigation and half of any *punitive* damages collected. (See, e.g., Tr. 205-08, 212, 263-64, 274-76, 312-13, 355-62, 448-54, 653-54, 734-35). In the execution of their claim-peddling scheme, Wells, and Rouillard employed Howard Hunt. (Tr. 262, 271-76, 310-15, 482, 498-504; 20a.) Both Wells and Rouillard remained in the employ of the loan companies until they had done all they could for their scheme. Shortly after Mrs. Wells quit, the first suit was filed. (Tr. 94; see also Tr. 93-94, 418; 81-86, 87.)

Clara Wells' role in the civil suits engendered by the claim-peddling scheme is crucial. Wells and Rouillard would receive no money unless they could furnish evidence that the Sachs brothers had knowledge of the double collections, since reward was to come only from *punitive* damages. Further, the size of their reward was directly linked to the degree of malevolence they could fasten upon the Sachs brothers. All the real evidence pointed only to Mrs. Wells' participation in the double collection: She wrote all the letters, filed all the claims, and received all correspondence and checks. (Tr. 377-82, 386, 390-95, 397-98, 401, 406-12, 426, 430-32.) Her initials and name are the only ones to appear on any correspondence. (Tr. 223, 470-71,

484-86, 488-91.) Thus, there was documentary evidence in the case, but not one shred of it showed that the Sachs brothers had any knowledge that the double collections had occurred.

But the claim peddlers were undaunted by the gap in the evidence necessary to render their scheme a profitable one, for Clara Wells' testimony in the civil suits, repeated at trial, neatly filled it. Acknowledging her active role in the double collections, she claimed it was all undertaken at the direction of Louis and Ralph Sachs. (Tr. 376-77, 379-88, 390-94, 406-12, 426.) She stated that she knew or believed her actions to be illegal and that she walked out when she was no longer able to stand it. (Tr. 414.) Mrs. Wells omitted to say, however, that her departure took place nine months after the first claimant was contacted, and only after all records and documents necessary to the civil claims had been surreptitiously photostated. (See, e.g., Tr. 341, 347, 356-357, 417-19, 426, 482-83, 620.)

The claim-peddling scheme was a smashing success. The Sachs brothers, having reached retirement age, were in the process of selling their business. The buyers imposed a condition that all pending claims be disposed of. Upon the advice of their attorneys and accountants, the Sachs brothers settled the claims for amounts that included substantial sums from which Rouillard and Wells could collect their reward. (Tr. 94, 288, 294, 335, 358, 253-54, 258, 191, 193, 199, 205, 608, 6[illegible]-58, 661-62, 692-93, 717-18, 737-38.)

The very same peddled claims, brought to the attention of the authorities by the civil suits nurtured by Wells and Rouillard, became the subject of this criminal prosecution. The material issue at trial was

not whether the double collections had taken place, but whether the Sachs brothers were guilty participants in them. On that issue, the Wells and Hunt testimony stands alone. Mrs. Wells repeated the testimony to which her role in the civil cases had wedded her. (Tr. 439-40, 461-62.) That very testimony, however, established that her participation in the charged events was active, voluntary, and knowingly illegal. The only disputed issue between Mrs. Wells and the Sachs brothers was not whether *she* was an active, knowing, and voluntary participant, but whether *they* were.

In view of this situation, petitioners requested the trial court to instruct that, if the jury found an accomplice relationship, it should view the accomplice's testimony with caution, and that any testimony by a witness with a personal stake in incriminating petitioners should be viewed with caution. The trial court refused. (Tr. 770, 857-58.) The Eighth Circuit upheld that refusal on the ground that the trial court had absolute discretion to grant or withhold such an instruction, and that, in any event, Clara Wells was not an accomplice, as a matter of law. (18a-21a.)

REASONS FOR GRANTING THE WRIT

1. The Requested Accomplice Instruction

The Eighth Circuit's decision in the instant case creates a direct conflict in the circuits on a question of importance to the administration of federal justice.

The question pertains to the definition of an accomplice and the circumstances under which a jury may be deprived of its function in relation to it. In *Phelps v. United States*, 252 F.2d 49, 52 n. 3 (5 Cir. 1958), a unanimous Fifth Circuit held that, where the evidence establishes a witness to be an active and volun-

tary participant, *the jury* must decide whether such person is an accomplice, even if, unlike Mrs. Wells, the witness disclaims knowledge of illegality. Indeed, a majority would have held such person an accomplice as a matter of law. *Phelps* v. *United States, supra,* at 52. In this case, however, where Mrs. Wells' own testimony established that she also knew or believed her activity to be illegal, the Eighth Circuit held that the jury had no role to play. Because Mrs. Wells had claimed that petitioners had directed the scheme, the Eighth Circuit held that she could not be an accomplice as a matter of law. (18a-19a.)

Accordingly, the Eighth Circuit approved the denial of the requested accomplice instruction. Notably, in *Phelps,* the Fifth Circuit had held that failure so to instruct is reversible error even where no such instruction was requested. *F.R.Crim.P.* 52(b). And that Circuit has also ruled that such an instruction is especially vital to a fair trial where, as in this case, the testimony of the accomplice is both utterly uncorroborated and aggravated by factors, such as the claim-peddling scheme, that cast doubt upon the accomplice's credibility. See *Williamson* v. *United States,* 332 F.2d 123, 131-32 (5 Cir. 1964).

It is also noteworthy that the Eighth Circuit has reversed its position. Prior to this case, it was reversible error to deny an accomplice instruction, if requested, where the accomplice's testimony provided the only proof of the defendant's participation in the crime. *Lett* v. *United States,* 15 F.2d 686 (8 Cir. 1926); *McLendon* v. *United States,* 19 F.2d 465 (8 Cir. 1927). The EighthCircuit now holds that the trial court has absolute discretion to deny the instruction and thereby curtail the jury's function on the credibility issue.

It is no answer to say, as the Eighth Circuit did, that, since counsel argued this point to the jury, the refusal to give the instruction was harmless (21a), for the trial court instructed that arguments of counsel were not evidence (Tr. 832) and that the only law applicable to the case would be given in the instructions (Tr. 831).

This petition does not call into question this Court's holding in *Caminetti* v. *United States,* 242 U.S. 470, 495 (1917), and *Holmgren* v. *United States,* 217 U.S. 509, 523 (1910), that a conviction may be based entirely on the uncorroborated testimony of an accomplice. In *Caminetti* and *Holmgren* the Court noted that it was the "better practice," to give a cautionary instruction. But in those cases none had been requested. It is now, however, no longer a question of the "better practice," but of the even-handed administration of federal justice. For two circuits have now collided over the issue. And it is surely a matter of widespread importance whether witnesses like Clara Wells and Howard Hunt should be permitted to appear before the jury respectably cloaked in judicial silence when their credibility is all that stands between a defendant and ten years in jail.

2. Harmless Error

In reviewing the record to determine (1) whether the trial court erred in refusing to grant the requested instructions, and (2) if so, whether that error was harmful, the Eighth Circuit refused to review any evidence or entertain any inference, except those favorable to the Government. (5a-6a.) This petition challenges that appellate posture as wholly inappropriate to the review of alleged instruction error and the question of its impact on the jury.

We do not challenge the sensible and time-honored appellate technique of reviewing the evidence in the light most favorable to the Government when the issue is whether there is sufficient evidence to justify the jury's verdict. That is an issue on which the appellate court may properly assume that the jury, properly instructed, has rejected the defendant's view of the facts. Here, however, the issue is not whether the Government's evidence was sufficient to sustain the verdict but rather whether the jury's rejection of petitioner's view of the facts was based upon proper instructions. Petitioners contend that the trial court committed error in refusing to give the accomplice instruction and that the error was not harmless because the refusal to give that instruction "might have contributed to the conviction." *Chapman* v. *California,* 386 U.S. 18, 23 (1967).

In an appellate review to determine whether the record required an accomplice instruction and, if so, whether its refusal was harmless, it is utterly destructive of reasoned appellate process to hunt only for the evidence and inferences favorable to the Government. For in the identification of instruction error and in the assessment of its possible impact, *all* the evidence and inferences that a jury might have considered are relevant. This case proves the point of the distinction.

The defense requested an accomplice instruction precisely because there *was* evidence of an accomplice relationship. And it is surely the law that the defense is entitled to an instruction if there is *any* evidence, on either side of the case, to support it. *Stassi* v. *United States,* 50 F.2d 526, 527 (8 Cir. 1931), quoting from *Smith* v. *Carrington,* 8 U.S. (4 Cranch) 62, 71 (1808),

per Marshall, C.J.; 5 Orfield, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, § 30.31, at p. 60. But if an appellate court may properly look only to evidence and inferences favorable to the Government, it will never even examine the evidence alleged to support the requested instruction. And that would turn the law on its head, since a criminal defendant would then be entitled to an instruction only when it supports the Government view of the case.

Instruction error was approved in this case precisely because the law was turned on its head. The Eighth Circuit justified the denial of the accomplice instruction by ignoring any inference from documentary or other evidence that Mrs. Wells' testimony was untrue. Viewing the evidence in the light most favorable to the Government, it had to assume (1) that her testimony was true; and (2) that only prosecution inferences could be drawn from it. Accordingly, it took as true her statement that she acted at the direction of the Sachs brothers and inferred that her involvement was only that of an employee "who *must* do the bidding" of her employer. (18a), (emphasis added.)

Moreover, the Eighth Circuit's approach makes nonsense out of this Court's test for *harmless* federal error. In *Kotteakos* v. *United States,* 328 U.S. 750, 776 (1946), and *Chapman* v. *California,* 386 U.S. 18, 23 (1967), the Court announced the test as "whether there is a reasonable possibility that [the error] might have contributed to the conviction." If, however, an appellate court may properly assess that possibility only after looking at a record reconstructed so as to contain only the evidence and inferences most favorable to the Government, the protection of the harmless error test evap-

orates. For, by that appellate process, even the closest case on guilt or innocence is easily converted into one containing overwhelming evidence of guilt. See *Harrington* v. *California*, 37 U.S.L.W. 4472 (June 2, 1969).

The pivotal issue in this case was whether the Wells-Hunt testimony *was* true. If the jury believed it, petitioners were guilty; if, on the other hand, the jury thought it untrue, the Government had no evidence. The requested instructions bore directly on the jury's consideration of whether the testimony was true. The "harmless error" question then is whether the denial of the credibility instruction might have affected the jury's evaluation of truth. But the Court of Appeals held the denial harmless by *assuming* the truth of the testimony and ignoring all else—a result that is circular but required if an appellate court is permitted to view the evidence in the light most favorable to the Government.

But under that appellate approach, error would never be harmful, for the impact of error would always be assessed against a picture of the case retaining only the dark markings of guilt, with all the highlights of innocence erased by an impermissible technique of appellate review.

3. The "Fictitious Name" Count

Under 18 U.S.C. § 1342, it is a crime to use a fictitious name "for the purpose of conducting, promoting, or carrying on" a mail fraud. Petitioners were convicted on one count for four letters sent to a borrower requesting payment. These letters were sent after one of the companies had collected the insurance proceeds, and were signed with the names "R. Tracy" and "J. Lewis."

Again, the only link between the Sachs brothers and these letters was the uncorroborated testimony of Clara Wells. And in this instance, her testimony was not only uncorroborated but contradicted by every other witness. (Tr. 371-74, 486; compare, e.g., Tr. 545-47, 551-54, 561-62, 566-67, 571, 592-93, 599-606.) Indeed, the major witness on this point, the account collector, testified that these names were routinely used in collection letters and that she entirely conceived and wrote these four letters. (Tr. 565-66.) Accordingly, this conviction, like those on the other counts was tainted by the refused accomplice instruction. (See Point 1, *supra.*)

But even if the conviction were not so tainted, petitioners contend that the use of fictitious names here is not covered by the statute. The statute covers only those situations where the fictitious name itself materially contributed to the alleged fraud or served to mask the identity of the malefactor against ready detection. See 20 Cong. Rec. 2329, 2564, 2652, 2673, 2723. By contrast, there was absolutely no proof here that the particular signatures affixed to these collection letters served in the slightest degree to induce the borrower to part with her money. The letters were exactly what they purported to be: collection letters from the loan company. The borrower parted with her money in the belief she was dealing with the loan company. The letters clearly stated the name and address of the company. Which, if any, of the company's agents, real or unreal, signed the letters cannot have been of the slightest interest to her.

Nor was there any evidence that the use of the fictitious names on these letters inhibited the Government in any way in detecting the alleged fraud and fixing responsibility for it. The prosecution's effort to pin

responsibility on petitioners for these frauds would not have been aided to the slightest extent had the account collector merely signed the company's name, or even the names of petitioners, rather than the "collection names."

The Eighth Circuit failed to draw any distinction between *the use of the letters* and *the use of the fictitious names* in the promotion or carrying on of the alleged scheme. Its opinion can only be read as holding that, since the *letters* themselves *might have* aided in the perpetration of the fraud, petitioners were properly convicted so long as they directed that the letters be written. (22a.)

The use of "convenience" signatures in commercial transactions is widespread. Whether Congress intended to penalize such a practice, and subject to a term of five years' imprisonment one who uses such a signature which neither misleads the recipient or materially conceals the identity of the sender, is an issue that should be settled by this Court.

CONCLUSION

For the foregoing reasons, the Writ should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,357

LOUIS SACHS AND RALPH SACHS, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Eastern District of Missouri.

[June 18, 1969.]

Before BLACKMUN, GIBSON AND BRIGHT, *Circuit Judges.*

GIBSON, *Circuit Judge.*

Ralph and Louis Sachs appeal from judgments of conviction entered in the United States District Court for the Eastern District of Missouri where a jury found each defendant guilty of six counts of using the mails in furtherance of a scheme to defraud in violation of 18 U.S.C. § 1341 and one count of using an assumed name while so using the mails in violation of 18 U.S.C. § 1342. Each defendant was sentenced to ten years—concurrent five-year terms on four of the counts, to be followed by five-year concurrent terms on the remaining three counts.

We affirm the judgments of conviction.

The Sachs brothers and their wives were the principal stockholders, directors and officers of a group of small loan companies, three of which are involved in this case. Louis and Ralph Sachs were the president and secretary-treasurer, respectively, of Mid-Continent Finance Corporation encompassing the following business entities: the home office at St. Louis, Missouri, d/b/a Allied Finance Company; a wholly owned subsidiary, Kennett Finance Company, at Kennett, Missouri; and two branch offices in

Tennessee. In addition, defendants operated the Clayton Insurance Agency from the home office as an adjunct to their money lending business. Between 12 and 15 people, in addition to the defendants, were employed at the home office.

The transactions involved in this case followed a pattern. When Mid-Continent held a customer's note, either through a direct loan or by purchase from a retail establishment that had extended credit to the customer, the customer was afforded the opportunity of purchasing credit life insurance. Mid-Continent established a business relationship with National Home Life Assurance Company and the Equitable Life Assurance Society, so that Clayton Insurance, as agent, could write credit life policies. Clayton Insurance retained 50 per cent of the premiums of each policy as commissions. The credit life insurance policy was written for the anticipated term of the loan to insure repayment in the event of the borrower's death. If the borrower were delinquent, so that the loan ran longer than expected, the insurance would lapse unless a new policy was purchased at an additional premium for the additional anticipated term. If the borrower prepaid the loan, a refund would be due on the premium for the unused term of the policy.

Two types of credit life insurance policies were written. One was a straight term policy on the borrower's life for the full amount of the loan for the projected period of the loan. The principal amount did not decline as payments were made. Upon the death of the insured borrower, the insurance company would pay the full amount of the policy. An amount equal to the unpaid balance on the loan would be paid to the lender, and presumably the balance to the borrower's designated beneficiary or his estate. The second type of policy was the reducing or declining balance type which paid to the lender upon the borrower's death only the amount of the unpaid balance

of the loan. Credit life policies were issued automatically upon application without reference to age, health, or any inquiry concerning the insurability of the borrower, the only requirement being the payment of the premium, the amount of which was fixed by a predetermined formula.

The defendants testified and admitted a double collection of six loans. When the borrower died the amount of the balance remaining on the loan was collected twice—from the insurance company, under the credit life policy on the borrower's life, and again from the estate or co-maker of the borrower or else the excess insurance proceeds were appropriated by the defendants. In three of the loans the borrower had purchased a full amount credit life insurance policy and, although Mid-Continent collected the full amount of the policy when the borrower died, the widow beneficiary never received her share.[1] In two of the loans, the borrower had purchased a declining balance policy and, although Mid-Continent received the outstanding balance from the insurance company when the borrower died, the collection department continued collecting from the surviving widow.[2] In the remaining loan, the borrower had refused to purchase credit life insurance. Allied Finance, without the knowledge of the borrower or the co-makers, purchased a declining balance policy on the borrower's life, and after the borrower's death collected insurance proceeds in the amount of the balance outstanding on the loan. Allied also collected the balance of the loan from the borrower's widow.[3] As to this double collection, the defendants freely admitted responsibility on

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[1] Count III, Mrs. Smith, defrauded of $282.70; Count V, Mrs. Lewis, defrauded of $443.25; Count VI, Mrs. Arnold, defrauded of $77.83.

[2] Count I, Mrs. Burress, defrauded of $201.88; Count IV, Mrs. Downs, defrauded of $525.00.

[3] Count II, Mrs. Costello, defrauded of $5,280.

appeal[4] contending they proceeded on the advice of their attorney and that such a double collection is legal under Missouri law. As to the other five double collections, the defendants attributed each incident to innocence or inadvertent clerical error.

The jury found the defendants guilty of fraud in each of the above double collections. In addition, the jury found each guilty of using an assumed name in the promotion of a scheme to defraud. The defendants did not deny that assumed names were used on collection letters, but contended that such was a common office practice with collectors at Allied Finance. Also, they unsuccessfully attempted to disassociate themselves from the practice by placing the onus on their employees.

On this appeal defendants urge (1) motions for acquittal should have been granted as to Count II (the Costello loan), as collection of the amount of the loan from both Mrs. Costello and the insurance company was legal under Missouri law; (2) denial of the motions for acquittal as to Count II requires reversal as to the other counts as well, as the government argued to the jury that defendants' admission of the facts involved in Count II was an admission of the scheme-to-defraud element of the offenses charged in all of the counts; (3) the trial court erred in failing to give defendants' requested "accomplice instruction" and (4) defendants' requested "interested informer" instruction; and (5) motions for acquittal should have been granted as to Count VIII, defendants' use of assumed names in the alleged scheme, since there was no

[4] At the trial, however, defendants first contended that the insured borrower had not signed the note and they were just gambling their premium against the insurance company's risk on the borrower's life; and that in purchasing the insurance they did not intend to effect a double collection in the event of his death. However, after receiving the insurance proceeds, defendants had second thoughts in the matter and aggressively proceeded to again collect the account.

evidence defendants were responsible for the particular uses of the names charged, and, even so, there was no showing that the use of assumed names materially contributed to the alleged fraudulent scheme.

At the outset we note the well-established rule that where concurrent sentences are imposed on several counts and the sentence does not exceed that which could have been imposed under a single count, the judgment may be affirmed if the conviction on any of the counts is valid. *Roviaro* v. *United States*, 353 U.S. 53, 59 n. 6 (1957); *White* v. *United States*, 399 F. 2d 813, 815 (8 Cir. 1968); *Jacobs* v. *United States*, 395 F. 2d 469, 473 (8 Cir. 1968); *Cave* v. *United States*, 390 F. 2d 58, 70 (8 Cir. 1968), cert. denied 392 U.S. 906.

In this case, concurrent sentences were imposed upon each defendant with regard to four of the counts—Count I, the Burress loan; Count III, the Smith loan; Count V, the Lewis loan; and Count VIII, use of assumed names on dunning letters sent to Mrs. Burress. Additional sentences were imposed with respect to three of the counts—Count II, the Costello loan; Count IV, the Downs loan; and Count VI, the Arnold loan—concurrent as to each other but consecutive as to the sentences on the other four counts. Thus, it must merely be determined that a conviction was proper upon at least one count in each group in order to affirm the judgments. *Atkinson* v. *United States*, 344 F. 2d 97, 98-99 (8 Cir. 1965), cert. denied 382 U.S. 867. We will, however, discuss more than two of the counts in order to cover all issues raised by defendants, but not all of the counts.

This being a jury case and the verdict having been in favor of the government and against defendants, the general rule is that the evidence must be viewed in a light most favorable to the government as the prevailing party and all reasonable inferences that tend to support the verdict of the jury must be accepted as established.

Hanger v. *United States,* 398 F. 2d 91, 108 (8 Cir. 1968); *Jacobs* v. *United States,* 395 F. 2d 469, 472 (8 Cir. 1968); *Kayser* v. *United States,* 394 F. 2d 601, 604 (8 Cir. 1968), cert. denied 393 U.S. 919.

With the above rules in mind, we examine the evidence with regard to one of the counts in each group and the Costello loan to determine if the jury could validly find the defendants guilty of mail fraud. We note that the use of the mails in carrying out the alleged scheme to defraud is apparent and is not in issue. Also, all of the double collections of insurance proceeds and loan balances, including insurance payments belonging to borrowers, are well established and in fact admitted. Defendants in their reply brief perceive the issue as: "The material issue here was not whether the double collections took place, but whether the Sachs brothers were guilty participants in them."

COUNTS I AND IV

Dorothy Burress (Count I) of Dunkirk, Indiana, testified that she and her husband borrowed $700—$800 in the summer of 1962 to finance a home improvement. The home loan contract was acquired by purchase by Allied Finance Company. The account was insured with credit life insurance of the declining balance type by the Equitable Life Assurance Society. At the time of Mr. Burress' death in May 1963, the unpaid balance on the loan was $750.26. Mrs. Burress' nephew wrote to Allied Finance shortly after Mr. Burress' death and explained that Mrs. Burress would need some time before commencing payments.

Clara Wells, a young woman employed by defendants in the home office, was primarily responsible for the preparation of claim forms and other necessary papers to be submitted to the insurance company upon the death of a borrower. Clara Wells testified that she was instructed

by Louis Sachs to prepare a claim form to be submitted to Equitable Life to claim the proceeds of the credit life insurance policy on the Burress' loan. She prepared the claim and submitted it to Louis Sachs who signed it in her presence. Shortly thereafter, Allied Finance received a check from Equitable Life for $750.26.

After receiving the insurance check, Louis Sachs dictated to Clara Wells the following letter addressed to Mrs. Burress under date of June 14, 1963: "Sorry to hear you have had such bad luck. When do you believe that it will be convenient for you to make payments? Yours very truly, Allied Finance Company, [signed] C. Graham, Collection Manager." The name "C. Graham" was the name of a former employee of Allied Finance. Clara Wells further testified that Louis Sachs knew that the insurance proceeds had been collected, and he told her that the letter was being sent to determine whether Mrs. Burress was aware that insurance existed.

Mrs. Burress obtained employment and began making regular payments to Allied Finance, although a few payments were missed. The government introduced letters from Allied Finance to Mrs. Burress under dates of October 3, 1963, June 12, June 17, June 26, and July 6, 1964; four of the letters were dunning letters signed by "R. Tracy" or "J. Lewis", and one letter signed by "D. Sanders" urged Mrs. Burress to purchase credit life insurance to insure her account. Clara Wells testified that "R. Tracy" and "J. Lewis" were assumed names used by Ralph Sachs and Louis Sachs, respectively, in collection matters. During this period Mrs. Burress also received several collect telephone calls from Allied Finance urging her to make prompt payments. Mrs. Burress paid $201.88 before she ceased making payments after learning that credit life insurance had been in force at the time of her husband's death.

Mrs. Marguerite Downs (Count IV) and her husband went to the home office of Allied Finance in March 1961

and after meeting with Ralph Sachs borrowed $1400, giving a mortgage on their furniture. Declining balance credit life insurance was purchased. At the time of Mr. Down's death in April 1963, $525 remained outstanding on the account. On June 6, 1963, Mrs. Downs went to the office of Allied Finance and inquired whether the credit life insurance would pay off the loan. Ralph Sachs told Mrs. Downs that the insurance had expired one month earlier and he said that $525 would settle the account. Mrs. Downs, utilizing a portion of insurance proceeds received from another source, paid Ralph Sachs the $525 requested. In fact, however, Louis Sachs had directed the renewal of the Downs' insurance policy, had dictated to Clara Wells a letter to National Home Life on the death claim, and Allied Finance had received a check dated May 23, 1963, in the amount of $500 in settlement of the claim.

We conclude that the evidence justifies the jury's finding that the defendants Louis and Ralph Sachs were guilty of using the mails to defraud in connection with the loan and credit life insurance transactions involving Mrs. Burress and Mrs. Downs. Thus, a determination of the validity of the other counts is not necessary as the judgments of conviction on Counts I and IV sustain the sentences imposed.

Defendants contend, however, that the invalidity of Count II vitiates all counts as the defendants' admission of the facts involved in the Costello loan was argued to the jury as an admission of the scheme-to-defraud element of the offenses charged in all of the counts. Even assuming *arguendo* that double collection of the Costello loan was technically legal as not coming within the ambit of proscribed conduct under the Missouri law, we believe (1) reversal of the other counts of conviction is not warranted; and (2) the evidence adduced as to the Costello transaction was relevant and was properly placed before the jury as showing a common scheme or pattern of operation.

Even if the evidence were improperly received, a reversal of the other six counts of conviction would not be warranted. Six separate and distinct instances of fraudulent double collection were charged against the defendants. The trial judge carefully instructed the jury:

> "* * * [A] separate crime or offense is charged in each count of the indictment. Each offense and the evidence applicable thereto should be considered separately as to each defendant. The fact that you may find one of the accused guilty or not guilty of one of the offenses charged should not control your verdict with respect to any other offense charged or with respect to the other defendant.
>
> "It is necessary for you to make a separate finding of guilt or innocence with respect to each count in which a defendant is charged, and if your finding is of guilt, it must be based upon your so finding beyond a reasonable doubt."

In each instance of double collection, save the Costello transaction, the defendants claimed innocence and clerical error. The government refuted defendants' claims to the jury's satisfaction by the use of competent evidence from which the jury could find that the double collections were effected by the defendants with the requisite fraudulent intent. A separate finding as to each of the counts was rendered by the jury. As stated in *Tyler* v. *United States*, 397 F. 2d 565, 570 (5 Cir. 1968):

> "Each count of an indictment is an entity, and each verdict rendered on each count is an entity. See *Dunn* v. *United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed 356 (1932); *United States* v *Russo*, 335 F. 2d 299, 301 (7th Cir. 1964), cert. den. 379 US. 962, 85 S.Ct. 651, 13 L.Ed. 2d 556 (1965)"

In *Hartwell* v. *United States*, 107 F. 2d 359 (5 Cir. 1939) the Court considered the situation where the validity of

two counts of conviction was at issue as not charging an offense under a statute making unlawful false statements with intent of influencing action of the F.H.A. A third count of conviction charged violation of the mail fraud statutes by the sending of a letter containing the same false statements to a bank. The Court held at 361 of 107 F. 2d:

> "But, if we are wrong in these views as to the validity of the first and second counts, this will not avail appellant, for convicted on a general verdict and given a sentence which could have been imposed under any one of the three counts, his conviction must stand if he was properly charged with an offense on the third count * * *."

However, we believe the evidence was relevant to show intent and knowledge and to refute defendants' claim of innocence of the other counts of double collection. In *Moses* v. *United States,* 297 F. 2d 621 (8 Cir 1961) the defendant was charged with instigating transactions out of which two false completion certificates were made for property loans insured by the F.H.A. The Court admitted testimony regarding a similar transaction instigated by the defendant, a transaction, however, where no fraudulent completion certificate was signed, holding at 623-624 of 297 F. 2d:

> "It is a general rule that evidence of a crime for which an accused has not been charged in the indictment is inadmissible and constitutes prejudicial error. * * * But where intent and knowledge are essential in proving the offense charged, evidence of transactions so connected with the charge * * * and evidence of other acts similar in nature tending to establish intent and guilty knowledge of the offense in issue * * * are two well established exceptions."

See also, *Brickey* v. *United States,* 123 F. 2d 341 (8 Cir. 1941).

Count II.

We believe the evidence on Count II was not only properly admitted, but that the convictions thereunder were valid. After Joseph Costello refused to take out credit life insurance, Louis Sachs purchased a policy of the declining balance type on the life of Joseph Costello, without Costello's knowledge. The policy was issued by National Home Life and the $75 premium was paid by Allied. Upon Joseph Costello's death during the term of the loan, Louis Sachs instructed that a proof of loss be filed with the insurance company for payment. The insurance company issued its draft in the amount of $4,317, which was the amount of the unpaid balance of Costello's loan. After Allied received the insurance proceeds, Mrs. Barbara Costello was called to defendants' office in St. Louis and Louis Sachs represented to her that the note was in arrears and insisted that the unpaid balance of the loan be renegotiated. Mrs. Costello acceded to this demand and executed a new note in the principal amount of $4320 to which $950 was added for interest, making a total amount of $5280. Mrs. Costello paid off this renegotiated note in full before she learned through Dave Ludwig, an accountant, that the insurance company had made payment of the unpaid balance of the Costello loan to Allied.

Mrs. Costello subsequently filed a civil action against the defendants for fraud, asking both compensatory and punitive damages. This suit resulted in a jury verdict against the defendants for $5,000 compensatory damages and $10,000 punitive damages. This case was not appealed and the judgment was settled for $12,000.

Now for the first time on appeal and in spite of the civil suit judgment for some $15,000, the defendants contend that the collection of the renegotiated note from Mrs. Costello was legal under Missouri law. This issue could properly be dismissed since it was not raised in the trial

court. However, we will examine the issue on defendants' contention of plain error.

The defense interposed to this count in the trial court was that the defendants were acting under advice of counsel, now deceased, to the effect that Mrs. Costello could not take advantage of the insurance company's payment of Mr. Costello's account in satisfaction of her contractual liability on the note.

The basis for defendants' legal contention on appeal is *Wells* v. *Thomas W. Garland, Inc.*, 39 S.W.2d 409 (Mo. App.1931). In *Wells*, which was a bailment case involving a fur coat, the Court held that the bailee under the bailment contract was an insurer and it could not take advantage of an insurance payment made by plaintiff's insurance company to cover the loss of the coat. Plaintiff had subrogated her claim against the bailee to her insurance company. There was no attempt to effect a double collection. The Court did hold that the bailee storage company was a stranger to the insurance contract and it was of no concern to it whether the bailor had recovered upon her policy or not. The Court went on to hold at 412 of 39 S.W.2d: " * * * [O]ne who is to be held to indemnity for his own wrong or breach of legal duty will not be heard to ask that the damages otherwise recoverable from him be mitigated to the extent of the insurance collected by the injured party," citing a number of Missouri cases applying this principle in the tort field. The Court then applied the principle applicable in tort cases to this bailment case.

On this basis defendants argue that if Mrs. Costello's legal liability on the note remained, the collection of that liability could not constitute a fraud and the use of the mails in connection therewith would not be illegal. We are not persuaded in the least. *Wells* is a bailment case, with no question of double recovery, no question of in-

surable interest. It is not at all concerned with the law applicable to insurance contracts and in particular credit life insurance.

If the double collection of the Costello loan amount were illegal under Missouri law the judgment of conviction on Count II should stand. In Missouri, as in most states, a party must have an insurable interest in the matter insured to effect a valid contract of insurance. A creditor does have such an insurable interest in the life of his debtor to the extent of the debt plus the amount of the insurance premium advanced by the creditor, and if an amount in excess of the debt is received by the creditor he holds such excess in trust for the debtor or debtor's estate. *Strode* v. *Meyer Bros. Drug Co.*, 79 S.W. 379 (Mo.App.1903); see, 115 A.L.R. 741, 745-748, Anno: Life Insurance for Benefit of Creditor (1938).

In *Strode* the creditor took out a $5,000 life insurance policy to cover a small indebtedness of about $100 plus interest. The policy was made payable $50 to the estate of the insured and $4950 to the creditor. Premiums totalling $299.40 were paid by the creditor. Upon the debtor's death the creditor collected and claimed the right to all of the insurance proceeds except $50. The debtor's estate sued to recover from the creditor all of the insurance proceeds except a sum sufficient to cover the debt, interest and premium cost. The Court in following prior Missouri decisions said at 381 of 74 S.W.:

> "• • • [B]y the law in this state appellant's [creditor's] interest in the policy did not exceed what Stokes [debtor] owed it, plus the amount of premiums it paid and interest, as we had occasion to point out recently in a similar controversy. The construction our courts put on such transactions as we have here is that the creditor, whether he be named as payee of the policy when it is issued, or becomes payee afterwards by assignment, acquires the status of ben-

eficiary as far as is necessary to make him whole, and no further. As to the remainder of the insurance money, he stands as trustee for the estate of the insured, or whomsoever the insured may have validly appointed to be residuary beneficiary. [Citations omitted.]

* * *

"The law views the contract of insurance as having been made for the benefit of the appellant [creditor] to the extent of its interest in Stokes' [debtor's] life, and for the benefit of Stokes' estate as to the excess of the fund realized from the policy."

The legal principles set forth in *Stokes* are relatively simple and clear. They represent the controlling law applicable to creditor-debtor life insurance policies and govern the case at bar. The debt plus any premium[5] paid by the creditor is the sole basis and the complete extent of the creditor's insurable interest in the life of a debtor. Any insurance proceeds received by the creditor must be applied to the debt and any excess belongs to debtor's estate or beneficiary. Thus where the policy proceeds are sufficient to pay the debt and premiums, if paid by the creditor, the debt is extinguished. The defendants had no right under Missouri law to make any further collection against Mrs. Costello on the Costello loan.

In *Morrow* v. *National Life Ass'n of Des Moines, Iowa,* 168 S.W. 881 (Mo.App. 1914) these same principles were reiterated with a review of the authorities in Missouri and elsewhere, the Court holding at 883: "* * * [T]hat the beneficiary can only collect *for his own use,* or retain,

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[5] It is immaterial whether the debtor or creditor pays the premiums and even whether the debtor knows about the insurance contract. *Morrow* v. *National Life Ass'n of Des Moines, Iowa,* 168 S.W. 881, 883 (Mo.App. 1914).

in case he collects all, an amount equal to the insured's indebtedness to him."

Since the validity of a credit insurance policy depends upon the existence of a debt owing to the beneficiary of the policy, the insurance contract in the debtor-creditor relationship can not be considered as independent and apart from the debt transaction. If the insured debtor died, it would appear that the creditor is then placed in the position where he has the option to obtain the insurance proceeds or to proceed against the debtor's estate or co-obligor. If the creditor accepts the insurance proceeds, these must be applied against the debt as the insurance contract depends upon the debt for its validity.

The defendants' actions initially were in accord with these general principles. Louis Sachs acknowledged that he had taken out the credit life insurance policy on Costello's life only to have security in the event that they would not be able to collect the account. In response to the question: "At the time that you bought the insurance did you at that time expect to keep the proceeds of it, as well as collect on your note?" Sachs answered, "Oh, no." At the trial Louis Sachs first contended that Joseph Costello was not obligated on the loan transaction. This contention was proved incorrect. Then Louis Sachs testified that after receiving the insurance draft on Costello's life he did not know exactly how to handle it so he discussed the matter with his attorney, who allegedly told him that Allied Finance could keep the proceeds as it paid the premium and it could collect the indebtedness again from Mrs. Costello. The defendants at the trial asserted lack of criminal intent, relying upon the advice of their deceased counsel. This issue was properly submitted to the jury under the following instruction:

> "If a man honestly and in good faith seeks advice from an attorney as to what he may do in a matter, and in good faith honestly follows such advice, rely-

ing upon it and believing it to be correct, and only intends that his acts shall be lawful, he does not possess the specific intent required, even if such advice were an inaccurate construction of the law."

Although not controlling, the parties including defendants and the government, appeared to be in agreement at the trial that the subsequent collection from Mrs. Costello was illegal. Louis Sachs, in testifying on cross-examination about the civil suit brought by Barbara Costello against defendants, admitted that the jury returned a verdict in Mrs. Costello's favor of $5,000 actual damages plus $10,000 punitive damages. His lawyer at the trial properly and with alacrity informed the Court that he was not the lawyer who advised Sachs to keep the insurance proceeds and also enforce collection against Mrs. Costello. It would also appear that the civil suit which resulted in a jury verdict on this very issue of an illegal collection or exaction against Barbara Costello would be determinative on this legal point but not, of course, on the criminal intent to defraud necessary for conviction on Count II. The civil judgment was not appealed or reversed and was subsequently settled. Criminal intent, however, was amply established by other evidence.

Errors in Instructions

Defendants' third contention is that the District Court erred in refusing to give the defendants' requested "accomplice instruction."[6] Defendants argued strenuously at the trial and reiterate here that Clara Wells and Paul Rouillard, former bookkeeper at Allied Finance, were the

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[6] The defendants requested the Court to instruct the jury that:

"An accomplice is one who voluntarily participates in the commission of the crime. You are instructed that the testimony of an accomplice should be closely examined and weighed with caution and great care."

parties guilty of criminal conduct in the double collections. They asserted that the testimony of Clara Wells in the civil suits, repeated at the criminal trial, established "that her participation in the charged transactions was active, voluntary, and with knowledge or belief that they were illegal."

The defendants now agree that a fraud has been perpetrated upon all of their borrowers named in the complaint with the exception of Mrs. Costello in Count II. They attempt, however, to picture themselves as innocent and the frauds as having occurred by either the inadvertence or the willful fraudulent acts of their employees. The employees, of course, including Clara Wells, were under the sole control and direction of the defendants. The record shows that the defendants were ready and eager to prey upon naive and unsophisticated widows by taking insurance proceeds belonging to them.

The Lewis loan (Count V) was a particularly aggravated swindle practiced upon a borrower of extremely limited resources. Thomas and Dorothy Lewis secured a loan from Kennett Finance Company in Kennett, Missouri. Thomas Lewis drowned while fishing in the Mississippi River. Dorothy Lewis informed James Collier, the resident manager, of her husband's death and cooperated in making the insurance claim. The insurance in this case covered the original amount of the loan and the insurance company issued a $700 check to Allied. The upaid balance on the loan at the time of Mr. Lewis's death was $256.75. Collier testified on direct examination that Louis Sachs directed him to credit $256.75 on the Lewis account, closing it out, and to issue a check in the amount of $443.25, representing the widow's portion of the insurance proceeds, to the order of Dorothy Lewis. Collier was further instructed by Sachs to secure Dorothy Lewis's endorsement on the check and credit the proceeds to Kennett Finance's uncollected accounts. Collier

prepared the check as directed and according to Mrs. Lewis presented the check to her face down with instructions to sign it in order to pay off her husband's account. Mrs. Lewis assumed that the check which she signed settled the loan account. She requested no further explanation and none was given. Collier said during the course of his direct examination that he recognized Louis Sachs' voice on the telephone in discussing the Lewis insurance proceeds transaction, but went on to say "Lou and Ralph [Sachs] sound a little alike." Collier later testified to another question concerning what party directed that the proceeds be appropriated: "To the best of my recollection it was Louis. Again, it has been a long time. It was either Lou or Ralph, or maybe Clara, but to the best of my recollection it was Lou." Clara Wells denied ever talking to Collier about the Lewis insurance. There is certainly no basis for classifying the young woman, Clara Wells, as an accomplice in this count or in any other count. There is no evidence that Clara Wells devised the fraudulent scheme of double collections or of appropriating insurance proceeds properly belonging to the borrowers' widows, nor is there any evidence that Clara Wells shared in defendants' unlawful gains. These fraudulent acts inured solely to the benefit of the defendants.

Therefore, we do not view Clara Wells as an accomplice. To characterize this young woman, who was merely doing her employers' bidding, as a criminal accomplice appears most unfair. The sordid business practices shown by the evidence were carried out under the direction of the defendants and for the sole benefit of the defendants. To attempt to transfer the blame to hired employees who must do the bidding of defendants in carrying out management's decisions has a particularly callow ring. These frauds were perpetrated by defendants for their sole benefit and pecuniary gratification. The employees involved were mere instrumentalities used in carrying out the

fraudulent scheme. They were not accomplices or informers in the proper legal denotation of those terms.

But even assuming that Clara Wells were an accomplice and that the charge requested by the defendants embodies a correct statement of the law, (neither assumption being regarded as well taken by us), reversible error was not committed by the trial court in failing to give the requested instruction. In *Esters* v. *United States,* 260 F. 2d 393, 397 (8 Cir. 1958), Judge Matthes stated the accepted rule:

> "[W]e do not understand that an absolute and mandatory duty is imposed upon the court to advise the jury by instruction that they should consider the testimony of an uncorroborated accomplice with caution. See *Caminetti* v. *United States,* 242 U.S. 470, at page 495, 37 S.Ct. 192, at page 198, 61 L.Ed. 442, where the Court in passing on a similar contention stated: 'In *Holmgren* v. *United States,* 217 U.S. 509, [30 S.Ct. 588, 54 L.Ed. 861] this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them.'"

Accord, *United States* v. *Finazzo,* 288 F. 2d 175, 176 (6 Cir. 1961), cert. denied 368 U.S. 837; *Lyles* v. *United States,* 249 F. 2d 744, 745-746 (5 Cir. 1957), cert. denied 356 U.S. 931; *United States* v. *Becker,* 62 F. 2d 1007, 1009 (2 Cir. 1933). See, *Krulewitch* v. *United States,* 336 U.S. 440, 454 (concurring opinion) (1949).

Defendants' fourth contention is that the District Court erred in refusing to give the defendants' requested "in-

terested informer instruction."[7] Defendants point to the fact that Clara Wells, Rouillard (not called as a witness) and one Howard Hunt contacted the widows, except Mrs. Arnold, who were the victims of Allied's double collections and signed them to contingent-fee contracts predicated on the widows collecting punitive damages in civil suits brought against the defendants. For their efforts in management of the civil suits—hiring attorneys and presumably supplying documentary evidence from Allied's files—Clara Wells and Rouillard were to receive one-half of any punitive damages collected. The defendants were engaged in selling their business while the civil suits were pending and when the prospective buyers imposed a condition that all pending claims be disposed of, the five civil suits, involving $6,732.83 claimed compensatory damages, were settled for a total of $36,000. Defendants argue that Clara Wells' admitted involvement in the "claim-peddling scheme"—she would be financially benefited if the Sachs brothers were found civilly liable for the double collections—committed her, out of a desire for self-preservation, to give testimony at the criminal trial of defendants that was consistent with the testimony she had previously given at one of the civil trials.

Defendants' contention is answered in *Sigler* v. *United States*, 208 F.2d 865, 867 (5 Cir. 1954), cert. denied 347 U.S. 991:

> "We reject the claim of error here made on the ground that the giving or refusal of such a charge is ordinarily within the discretion of the district judge, and its refusal will not be held to be error in the

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[7] The defendants requested the Court to instruct the jury that:

> "The testimony of an informer who provides evidence against a defendant for personal advantage or vindication must be examined and weighed by the jury with greater care than the testimony of an ordinary witness."

> absence of a showing, not made here, that it has been abused. When the charge as a whole, particularly the charge as to the informer['s] * * * credibility; is considered in the light of the record made, we think it plain that the refusal of the charge was not error, prejudicial to appellant."

Accord, *United States* v. *Hoffa*, 349 F. 2d 20, 52 (6 Cir. 1965), aff'd 385 U.S. 293, rehearing denied 385 U.S. 940; see, *Rowell* v. *United States*, 368 F. 2d 957, 962 (8 Cir. 1966), cert. denied 386 U.S. 1009. The trial court gave the usual instruction concerning factors to be taken into account by the jury in assessing the weight to be given to witnesses' testimony. Considering the fact that Clara Wells' connection with Rouillard and the civil suits was explored thoroughly by defense counsel on cross-examination of government witnesses and argued forcefully to the jury, we cannot say that in light of the charge given to the jury prejudicial error was committed by the trial court in failing to give the proffered instruction relating to the testimony of an "interested informer." The interest of Clara Wells and some of the other employees in the civil suits against the defendants was properly and extensively brought out in the trial and it was a matter for the jury to consider in assessing credibility. The credibility of the witnesses was for the jury's determination. Clara Wells did not inform the government of these frauds, and was not an informer. She was not recruited, solicited, or paid by the government to obtain evidence or to testify.

Use of Assumed Names

Defendants' final contention is that the District Court erred in denying defendants' motion for acquittal as to Count VIII, defendants' use of assumed names in the fraudulent scheme, since there was no evidence that they were responsible for the particular uses of the names charged, and there was no showing that the use of as-

sumed names materially contributed to the fraudulent scheme.

A determination on this point is not necessary to sustain the defendants' convictions and sentences (as discussed, *supra*). However, we note in passing that there was ample evidence in the record from which the jury could find that Mrs. Burress received dunning letters signed by "R. Tracy" and "J. Lewis" which were written at the direction of Ralph Sachs and Louis Sachs, respectively. Title 18 U.S.C. § 1342 requires only that the use of the assumed name be "for the purpose of conducting, promoting, or carrying on * * * any scheme or device mentioned in [the mail fraud statute]." Further, the assumed names contributed materially to the fraudulent scheme. The defendants could seek to avoid responsibility for, and disclaim any knowledge of, letters signed by "R. Tracy" and "J. Lewis" if the assumed names were used by many persons in defendants' office as was claimed by them. Pinpointing responsibility for the letters would obviously be made more difficult.

Defendants were represented by able and competent counsel, both at their trial and on appeal. Almost every considerable question has been raised in their defense. The experienced trial judge,[8] fully and fairly submitted the issues to the jury, which resolved all factual issues against the defendants. The record fully supports the judgments of conviction.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[8] The Honorable James H. Meredith (E.D. Mo.).

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	8
Conclusion	12

CITATIONS

Cases:

Baker v. *Keet-Rountree Dry Goods Co.*, 318 Mo. 969, 2 S.W. 2d 733	9
Benton v. *Maryland*, 395 U.S. 784	11
Cammack v. *Lewis*, 82 U.S. 643	9
Phelps v. *United States*, 252 F. 2d 49	10
Risinger v. *United States*, 236 F. 2d 96	9
Strode v. *Meyer Bros. Drug Co.*, 101 Mo. App. 627, 74 S.W. 379	9
Warnock v. *Davis*, 104 U.S. 775	9
Williamson v. *United States*, 332 F. 2d 123	10

Statutes:

18 U.S.C. 1341	2
18 U.S.C. 1342	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 478

LOUIS SACHS AND RALPH SACHS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1969. Mr. Justice White extended the time for filing a petition for a writ of certiorari to August 16, 1969, and on August 15, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly refused to give an accomplice instruction.

2. Whether the evidence sustained petitioners' conviction of using a fictitious name to promote a mail fraud.

STATUTE INVOLVED

18 U.S.C. 1342 provides:

> Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioners were convicted on seven counts of an indictment charging six counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of using fictitious names

for the purpose of promoting such fraud, in violation of 18 U.S.C. 1342. Each petitioner was given concurrent five-year sentences of imprisonment on four of the counts, to be followed by an additional five years of imprisonment on the three remaining counts (1 R. 1-8, 63-64). The court of appeals affirmed.

Petitioners, who are brothers, were the controlling officers and, with their wives, the sole stockholders of certain loan companies[1] operating in St. Louis, Missouri (Tr. 53-54, 608-611, 718), which had either made or purchased the six loans involved in this case. The borrowers, husband and wife, had paid for credit life insurance on the husband for the anticipated term of five of these loans. Some of these policies were for a reducing term, decreasing the principal on a monthly basis according to the scheduled reduction of the loan by regular payments. The others were "level term" policies, on which the full amount of the loan was payable throughout the life of the loan (Tr. 218-219). The borrower on the sixth loan, one Costello, had refused to purchase insurance, and the company did so at its own expense (Tr. 624-626). As to each of these transactions,[2] the salient circumstances of which are detailed below, the loan company both collected the life insurance and induced the widow to make or sign over additional payments.

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[1] Hereinafter referred to as the "loan company," inasmuch as they operated substantially as a single unit.

[2] It appears that a total of eighteen death claims were made from January 1, 1959, to April 1, 1963 (Tr. 828).

1. *Burress loan, counts 1 and 8.* Following Mr. Burress' death, petitioner Louis Sachs instructed his secretary, Mrs. Wells, to write the widow a letter over the signature of "C. Graham, Collection Manager," expressing sympathy and asking when it would be convenient for her to resume payments (Tr. 375-376). Shortly thereafter, he directed Mrs. Wells to make a claim to the insurance company for $750.26, the amount due on the loan. The claim was promptly paid (Tr. 66-67, 111, 377-381). The widow was then sent further dunning letters, over the signatures of "J. Lewis" or "R. Tracy." "J. Lewis" was a name used by the office in making collections, to represent Louis Sachs; "R. Tracy" was used to represent Ralph Sachs (Tr. 77-86, 371-373, 428, 473, 493-496). The widow paid $201.88 before learning that the insurance company had already paid the account in full (Tr. 86-87, 111).

Costello loan, count 2. Unknown to the Costellos, the loan company had purchased a reducing term policy on their debt after Mr. Costello refused to buy one (*supra*, p. 3; Tr. 399, 624-626). Following Costello's death, and pursuant to instructions from Louis Sachs, Mrs. Wells applied to the insurance company for $4,317, which was paid. Louis Sachs then personally demanded of the widow that she execute a new note for $5,280, including accrued interest, which she did. She learned of the insurance company's payment through an accountant only after she had paid the note in full (Tr. 242, 286-292, 322-325, 400-402).

Smith loan, count 3. The level term insurance on this account yielded a check for $817.30 to the loan company and a check for $282.70 payable to the widow (Tr. 233-234). A man at the loan company, identified as Ralph Sachs by one Hunt, an undertaker's employee who had accompanied the widow to the loan company office, told the widow that she could either have the check payable to her or the Smiths' mortgaged automobile, but not both. Faced with this demand, the widow endorsed the check in blank (Tr. 309-310, 333-336).

Downs loan, count 4. Mrs. Downs asked Ralph Sachs if the insurance on the life of her deceased husband would not pay off the loan. Sachs replied that the policy had lapsed and insisted that the widow pay $525 to settle the account. She did so, from the proceeds of other insurance. The company had already received payment in full from the insurance (Tr. 253-257, 393-397).

Lewis loan, count 5. Following Mr. Lewis' death, the manager of a subsidiary loan company in Kennett, Missouri, directed the widow to submit documentary evidence of the death in order to collect on the insurance. The manager then transmitted these papers to the loan company in St. Louis, which forwarded them to the insurance company. The insurance company issued its check for $700 on the level term policy, which was of the "level term" type. The balance due on the Smith loan was $256.75 (Tr. 128-139, 174-176, 227). Louis Sachs directed the manager to credit the latter amount to the Smith account, closing it out. He directed that a check for

the balance be issued payable to the widow, that the manager secure her endorsement on it, and that he treat the item as a recovery on old uncollectible accounts (Tr. 134-135). In carrying out these directions, the manager presented the check to the widow face down. She gave her endorsement, understanding that it was necessary to settle the account (Tr. 191-193).

Arnold loan, count 6. A level term policy was issued to cover this loan of $288. Following the death of the husband, who had made only one payment, the insurance company paid the loan company $300 on the policy. No part of this was paid over to the widow (Tr. 228-229, 406-409, 508-511).[3]

2. The defense brought out that the loan company's bookkeeper, Rouillard, had become disenchanted with his employers and had sought to turn over to the manager of the Kennett branch stock certificates which would have given the latter ownership of that company. Following the manager's rebuff of this offer, Rouillard had contacted several of the widows mentioned above and, on behalf of himself and Mrs. Wells, had negotiated contracts for the bringing of civil suits against the loan company. Rouillard and Mrs. Wells were to share in the proceeds of these suits, either fifty percent of the total recovered or fifty percent of the punitive damages (Tr. 257, 270-276, 294, 441, 458, 467-470). All of these suits had been settled, some after trial, for substantial amounts (Tr. 258-263, 294-295, 355, 357-358, 691).

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[3] Count 7 was dismissed before trial (Tr. 43).

Petitioners stress their own testimony in the trial of this case. Louis Sachs testified that he would have settled none of the civil suits had he known of the arrangement whereby Rouillard and Mrs. Wells shared therein (Tr. 632, 646, 653). He denied in detail the testimony (*supra*, pp. 4, 5) linking him with the recovery of double payment of the Burress and Lewis loans (Tr. 634-642, 647-652, 698-700). He said that following the death of Costello, he told the company's attorney, now deceased, that the insurance company's payment belonged to the loan company, which had paid the premium. The attorney agreed and told him to deposit it to the loan company's funds (Tr. 629, 684, 692). This was his "gamble" with the insurance company (Tr. 685-686). Louis Sachs further testified that "J. Lewis" was a name used in the office because people had started calling him "Mr. Lewis"; that "J." was from Junior. He had not authorized its use in the office (Tr. 705-707). The name Tracy was that of a former employee. To his knowledge, his brother, Ralph Sachs, did not use the name of "R. Tracy" (Tr. 708-710).[4]

Ralph Sachs denied that he had ever signed his name as "R. Tracy" or authorized use of that name on letters addressed to Mrs. Burress (Tr. 730-734). He said that the deceased lawyer had advised that

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[4] An employee in the office testified similarly as to the use of this name (Tr. 545-547, 559). Sachs' daughter, however, testified that "R. Tracy" was essentially the same as Ralph Sachs on collections and that "J. Lewis" was Lou Sachs (Tr. 601-603).

the proceeds of the Costello insurance should go to the company and no credit should be given to the Costello account because "the insurance company may come back and demand the money back" (Tr. 725). He denied the testimony of government witnesses (*supra*, p. 5) that he personally brought pressure on Mrs. Smith and Mrs. Downs to renew payments on their loans after death of their husbands (Tr. 730-734, 767).

The case was submitted to the jury on instructions, to which no exception was taken, that a man is not punishable for mistakes or for errors of judgment (Tr. 835), or for the acts of his employees which he did not knowingly direct (Tr. 853), but only for his own intentional criminal acts (Tr. 851-852). In this connection, the jury were further instructed that if a man honestly and in good faith seeks and follows the advice of an attorney, intending that his acts be lawful, he lacks criminal intent, even though the advice given should be inaccurate (Tr. 844, 852). Instructions in customary form were also given as to the presumption of innocence, the burden resting upon the government to prove guilt beyond a reasonable doubt, and the credibility of witnesses (Tr. 833-835, 855-856). The jury returned a verdict of guilty on all counts against both petitioners (Tr. 859-860).

ARGUMENT

Petitioners present no considerations warranting a grant of certiorari. Although they disclaim any intention to question the sufficiency of the evidence,

the whole of their brief is devoted to an attempt to present the case as that of two reputable businessmen victimized by unscrupulous employees. This view, fully argued to and rejected by both the jury and the courts below, does not reflect the government's case, which was ample to support their conviction.[5] Without it, the insubstantiality of the petition plainly appears.

1. An accomplice instruction[6] presupposes that

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[5] Mrs. Wells' testimony that Louis Sachs directed the double collection of the debt from both the borrower and the insurance company was corroborated by the testimony of the manager of the Kennett branch office in the particular case of the Lewis loan. The personal participation of Ralph Sachs was testified to by Ralph Hunt, the employee of the undertaking establishment who accompanied Mrs. Smith to the loan office, and by Mrs. Downs who was told by this petitioner that the policy on her deceased husband's life had lapsed. The cooperation of the two brothers in the direction of the company's affairs, which alone received the benefit of such double charges, supported an inference of mutual responsibility of each for the other's acts. The disputed factual contentions, which petitioners still argue to the Court, were resolved on proper instructions by the jury. The impropriety of the double collection of the Costello debt, contested by petitioners, is established both by Missouri law and the law generally. *Baker* v. *Keet-Rountree Dry Goods Co.*, 318 Mo. 969, 2 S.W. 2d 733; *Strode* v. *Meyer Bros. Drug Co.*, 101 Mo. App. 627, 74 S.W. 379; and see *Warnock* v. *Davis*, 104 U.S. 775; *Cammack* v. *Lewis*, 82 U.S. 643.

[6] Petitioners submitted the following instruction (Pet. App. 16):

> An accomplice is one who voluntarily participates in the commission of the crime. You are instructed that the testimony of an accomplice should be closely examined and weighed with caution and great care.

As the court below noted, it is highly questionable whether an instruction in this form correctly states the law. Compare *Risinger* v. *United States*, 236 F.2d 96, 99 (C.A. 5).

the person concerned may have been in league with the defendant in his criminal scheme. Neither the government's case nor petitioners' is consistent with that view of the facts. The government's submission was that Mrs. Wells was an unwilling employee, who did what she was told but took no profit from the criminal scheme. Petitioners' argument, fully aired to the jury, was that they were innocent of wrongdoing, and had been "framed" by their employee who in fact was wholly responsible for any fraud. Neither theory supports the giving of the instruction. In any event, as the court below found (Pet. App. 19a), refusal to give the instruction even where appropriate does not necessarily constitute reversible error. This is not a case like *Phelps* v. *United States*, 252 F. 2d 49 (C.A. 5), where the judge affirmatively told the jury to disregard any possibility that an alleged accomplice was criminally implicated, or *Williamson* v. *United States*, 332 F. 2d 123 (C.A. 5), where the court of appeals appears to have reached the conclusion that the alleged accomplice should have been disbelieved. Both those opinions, petitioners' sole reliance for his claim of conflict, were expressly grounded "in the circumstances" of those particular cases. 252 F. 2d at 53, 332 F. 2d at 131 n. 9. Since similar circumstances are lacking here, and on the authority cited by the court below, it is clear that there is neither conflict among the circuits nor any other matter of importance warranting certiorari on this issue.[7]

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[7] Petitioners' claim that the harmless error rule was misused in this case is without support in the decision below. In

2. The evidence fully supported petitioners' conviction, under count 8, of using fictitious names to promote the fraudulent scheme. Aside from any question of the sentence on this count being concurrent with the sentences on counts 1, 3, and 5 (see *Benton* v. *Maryland*, 395 U.S. 784), the evidence showed that "J. Lewis" and "R. Tracy" were fictitious names petitioners used "for the purpose of conducting, promoting, or carrying on" through the mails the scheme as it applied to Mrs. Burress (*supra*, p. 4). Moreover, as the court of appeals pointed out (Pet. App. 22), the use of assumed names in itself contributed materially to the fraudulent scheme by making more difficult the pinpointing of responsibility for originating and executing the scheme.

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reaching its decision, the court relied upon a count as to which Mrs. Wells' testimony was not implicated, Pet. App. 17a-18a; nor did it apply a "harmless error" rule as such. It determined only that in the circumstances of this case an accomplice instruction was not required.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

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OCTOBER TERM, 1969

No. 478

LOUIS SACHS AND RALPH SACHS, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONERS' REPLY BRIEF

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CITATIONS

CASES:

	Page
Bass v. *United States*, 324 F. 2d 168 (8 Cir. 1963)	4
Hoback v. *United States*, 284 F. 529 (4 Cir. 1922)	4
Julian v. *Davis*, 214 Mo. App. 525, 259 S.W. 142 (1924)	2
Phelps v. *United States*, 252 F. 2d 49 (5 Cir. 1958)	2
Strode v. *Meyer Bros. Drug Co.*, 101 Mo. App. 627, 74 S.W. 379 (1903)	2
Wells v. *Thomas W. Garland, Inc.*, 39 S.W. 409 (Mo. App. 1931)	2
Williamson v. *United States*, 332 F. 2d 123 (5 Cir. 1964)	2

MISCELLANEOUS:

Orfield, Criminal Procedure Under The Federal Rules	4

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PETITIONERS' REPLY BRIEF

This case turns not on complex factual issues,[1] but on straightforward legal issues, all of which the Government appears unwilling to confront.

In support of its assertion that this case creates no conflict between the Fifth and Eighth circuits on the need for a cautionary instruction when an

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[1] The bulk of the Government's brief (pp. 2-8) is devoted to its "statement of the case," a marshalling of the evidence from a view most favorable to the Government. Since petitioners have not argued that there was insufficient evidence upon which a properly instructed jury could have convicted (see Pet. 10), this entire portion of the brief is irrelevant.

entire case[2] is built on uncorroborated[3] accomplice testimony, the Government (Gov. Br. 9-10) strains to distinguish *Phelps* v. *United States*, 252 F. 2d 49 (5 Cir. 1958), but it cannot explain away *Williamson* v.

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[2] The Government attempts to persuade this Court that there was ample evidence, untainted by Mrs. Wells, to sustain the conviction. (Gov. Br., p. 9 n. 5.) This is not true.

First, Mrs. Wells' testimony was indispensable to conviction on all but the third count, involving the Smith loan. As to that count, she did not testify at all. The only evidence culpably linking either Sachs brother to Count 3 was provided by Howard Hunt, a witness acknowledged even by the Eighth Circuit to have been in Mrs. Wells' and Rouillard's employ in the claim-peddling scheme. (Pet. App. 20a.) Thus, he had the same motivation to fabricate the Sachs brothers' involvement in these frauds as Mrs. Wells. The credibility defect in his testimony would have been covered by the Sachs' request for an instruction advising the jury to treat with caution the evidence of one motivated by self-interest in testifying as he did. (Tr. 857-58.) But the trial court denied this instruction as well as the accomplice instruction. Hunt's testimony is therefore subject to the same defect as Mrs. Wells'.

Second, the Government argues that the double collection under the Costello loan (Count 2), admitted by the Sachs brothers, was improper under Missouri law and law generally, citing to *Strode* v. *Meyer Bros. Drug Co.*, 101 Mo. App. 627, 74 S.W. 379 (1903) and similar cases. As pointed out in petitioners' brief (p. 4 n. 2), the *Strode* line of cases do not support this argument. All they establish is that a creditor may not overinsure his debtor's life; if he does collect insurance in excess of the amount owed at death, that excess must be paid over to the deceased debtor's estate. But the Sachs brothers did not overinsure Costello's life. The insurance policy, by its terms, paid only the amount of the debt owed at Costello's death. The Government, like the Eighth Circuit, then chooses to ignore the law on the critical issue, whether Costello or his co-obligors were entitled to the benefit of payment under the insurance policy so as to extinguish their liability on the note. Under the Missouri collateral source rule, it is clear they were not. *Wells* v. *Thomas W. Garland, Inc.*, 39 S.W. 409, 442 (Mo. App. 1931); *Julian* v. *Davis*, 214 Mo. App. 525, 259 S.W. 142 (1924). Since Costello and his co-obligors were not entitled to claim the benefit of payment under the insurance policy (a contract to

United States, 332 F. 2d 123 (5 Cir. 1964). It attempts to dismiss the *Williamson* case on the "ground" that the Fifth Circuit "appears to have reached the conclusion that the alleged accomplice should have been disbelieved." (Gov. Br. 10.) The explanation for both cases is, of course, that the Fifth Circuit agrees with petitioners' contention that, while our legal system tolerates putting a man in prison on the mere word of one whose own involvement motivates him to lie, funda-

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which Costello was not only a stranger, but in which he had specifically refused to participate), that payment did not extinguish their liability under the note, and Missouri courts would have enforced continued collection from Mrs. Costello.

Third, the Government argues that the loan companies alone received the benefit of the double collections. Again, it must rely exclusively on Mrs. Wells. Petitioners pointed out that the fact the insurance checks had been deposited to the loan company's account did not prevent Wells or Rouillard from receiving the proceeds therefrom, since they could easily have deposited the checks while pocketing a simultaneous cash withdrawal. (Tr. 744-45.) To refute this version of events, Mrs. Wells testified that the proceeds of all checks had been deposited to old uncollectible accounts (from which no funds could be withdrawn). Her testimony on this point is uncorroborated. The corporation had been sold prior to the time the indictment was returned; the successor corporation destroyed records after a certain period of time, and the bookkeeping records could not be found. (Tr. 384-86, 515-23.)

Fourth, the Government argues that petitioners dispute facts "resolved on proper instructions by the jury." This, of course, begs the very question at issue.

[3] The Government states that Mrs. Wells' testimony was "corroborated" by the testimony of the branch manager, in regard to Count 5. This statement is contradictory to another part of the Government's brief (pp. 10-11 n. 7, where the Government seeks denial of the petition on the ground that Mrs. Wells' testimony "was not implicated [sic]" in this count). In addition, as pointed out, infra pp. 5-6, this statement is false.

The Government does not even claim there was corroboration on any other count.

mental fairness requires that the jury at least be cautioned to think carefully before accepting that word. The Eighth Circuit disagrees. Had petitioners been tried in the Fifth Circuit, their convictions would have been reversed; since they were tried in the Eighth, their convictions stand. It is as simple as that.

Alternatively, the Government argues that, regardless of any conflict in circuits, the denial of an accomplice instruction[4] was proper on the astounding ground that the instruction would have been inconsistent with the Sachs brothers' claim of innocence. (Gov. Br. 10.) Surely they cannot seriously contend that only a defendant who pleads guilty is to be given the protective instruction.

One of the most significant issues presented by petitioners is whether it is proper to view the evidence in the light most favorable to the prosecution in determining whether it was reversible error to refuse a defense-requested instruction. (Pet. 9-12.) The Gov-

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[4] The Government's contention that it was proper to refuse *any* instruction because the trial court might have preferred different wording than that contained in the instruction submitted by the defense defies characterization. A criminal trial is not a word game. Ten years of these men's liberty is at stake. Indeed, since they are both in their sixties, what is at stake may well be the rest of their lives. The defense adequately alerted the trial court to its contention that the evidence supported an accomplice instruction. If the trial court did not deem the requested instruction proper in part, it was free to reject the specific request (*Bass* v. *United States*, 324 F. 2d 168, 172 (8 Cir. 1963)) and substitute its own. It cannot, however, refuse to give any instruction at all in the event that counsel, lacking clairvoyance, does not hit upon the specific wording the trial judge likes. See 5 Orfield, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, § 30:37, pp. 65-66; *Hoback* v. *United States*, 284 F. 529, 533-35 (4 Cir. 1922).

ernment ignores petitioners' contentions that this mode of review as applied to an issue of instructional error stands the law on its head. (Pet. 10-11.) As far petitioners' attack upon the misapplication of the harmless error doctrine to the instructional error, the Government relegates the whole issue to a footnote. (Gov. Br., pp. 10-11 n. 7.) If this Court permits such facile subversion of the harmless error doctrine, the doctrine itself will soon be reduced to an anachronistic though interesting footnote in legal history. (See Pet. 11-12.) The Government says, in its footnote, that the doctrine is not involved because the Eighth Circuit "did [not] apply a 'harmless error' rule *as such*." (Gov. Br., pp. 10-11 n. 7. Emphasis added.) Perhaps it views the Eighth Circuit's citation to the doctrine of "reversible error" (see Gov. Br. 10) as involving something different. The footnote also asserts that the harmless error doctrine is not involved because the Eighth Circuit relied upon a count in which Mrs. Wells' testimony was "implicated." The Government's statement, undoubtedly through inadvertence, is flatly wrong. Mrs. Wells' testimony was demonstrably indispensable to a conviction on the count referred to, Count 5, involving the Lewis loan. (Pet. App. 17a-18a.) The critical issue was the identity of the person who issued the instructions concerning the disposition of the excess Lewis insurance proceeds. Mr. Collier, the branch manager, testified that the instructions were telephoned by someone in the home office, but could not remember whether the caller was Louis Sachs, Ralph Sachs, or Mrs. Wells. (Tr. 148-49, 137, 176-77.) Mrs. Wells testified that she had never had a telephone conversation with Mr. Collier, that she had given him no instructions concerning the Lewis refund check, and

that Louis Sachs had dictated all the correspondence. (Tr. 390-393.)

Respectfully submitted,

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